IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAMBRIDGE UNIVERSITY PRESS, ET AL,

Plaintiffs,

v.

CARL V. PATTON, ET AL,

Defendants.

CIVIL ACTION
FILE NO. 1:08-CV-01425

BEFORE THE HONORABLE ORINDA D. EVANS
TRANSCRIPT OF PROCEEDINGS
DECEMBER 12, 2016

APPEARANCES:

For the Plaintiff: JONATHAN BLOOM
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Attorneys at Law

For the Defendant: STEPHEN M. SCHAETZEL
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Proceedings recorded by mechanical stenography
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DECEMBER 12, 2016

2:09 P.M.

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P R O C E E D I N G S

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THE COURT: Good afternoon, everybody.

MR. SCHAETZEL: Good afternoon.

MR. BLOOM: Good afternoon, Your Honor.

THE COURT: How are you?

MR. SCHAETZEL: Good, thanks.

THE COURT: How are my old friends?

MR. SCHAETZEL: Getting older.

THE COURT: Yeah, I know, aren't we? We all are, for sure.

As you all know, this is set down for a hearing on the defendant's motion for production of the plaintiffs' billing records. I've read the briefs that y'all have filed, and let me tell you what's -- what I'm thinking at this point.

I am assuming that the -- well, maybe I shouldn't assume this. I am assuming that the bill that the defendants wish to have approved by the Court would be inclusive of the attorneys' fees expended before the last go-around; in other words, what I'm thinking is after I initially ruled on the merits, the defendants, I believe, sought to collect fees. And I think you all reached some type of agreement about what

those fees would be, or what reasonable fees would be. Not an agreement, I understand the plaintiffs didn't agree that they should pay any fees.

But putting that aside for just a moment, my best recollection is that y'all informed me that you had come to an agreement about what the amount, the reasonable amount would be and that that is the amount of attorneys' fees that was taxed originally as part of the judgment. Feedback?

MR. SCHAETZEL: Your Honor, on behalf of the defendant, GSU Board of Regents, I'm Steve Schaetzel. And I think the way we think of it, Your Honor, is consistent with Ms. Singer's comments at a previous hearing before the Court, she indicated -- Ms. Singer's counsel for the plaintiff publishers.

THE COURT: Right.

MR. SCHAETZEL: And she indicated that they were not going to challenge either the rate nor the amount of hours, which I think leads to ultimately the conclusion that for that original amount in terms of fees, if you will, there was at least no contest, if not no -- if not an agreement that that was a reasonable amount.

THE COURT: Right, right. So in my mind, there's no need to plow that ground again.

Do y'all agree, Mr. Bloom?

MR. BLOOM: Yeah, Your Honor, if I might. You'll

recall there was some litigation over -- some dispute over certain categories of the fee request that defendants made back after Your Honor's post-trial ruling. And so we disputed some of those, and the Court accepted certain of our arguments and arrived at a determination of a reasonable amount of fees and costs. And those amounts were then, after that, those issues had been litigated was part of Your Honor's judgment.

And then obviously, as Your Honor knows, the case went up to the Eleventh Circuit, which vacated both the merits ruling and the fee award that was based on it.

THE COURT: Correct.

MR. BLOOM: And as a result, Your Honor, we think as we sit here now, it's appropriate for the Court to revisit in light of the Eleventh Circuit's ruling whether that prior award which rested on the Court's finding that the --

THE COURT: But why should -- I don't know why we need to revisit it. I mean, if y'all agreed to it originally as to the issue of the reasonableness of the amount --

MR. BLOOM: Yeah, if I might, Your Honor. The reason is because circumstances subsequently changed. In our view, the Eleventh Circuit materially changed the applicable law and we believe changed the extent to which the defendants at that point could be considered the prevailing party or the extent to which their advocacy was successful.

THE COURT: Yeah, but see I'm not talking now

about -- well, maybe I --

MR. BLOOM: Your Honor, if I might just refer the Court for its consideration to what the Eleventh Circuit said in the *Norman* case, which we've cited in our brief.

THE COURT: I'm very familiar with the *Norman* case. You don't need to do that.

MR. BLOOM: Okay. But --

THE COURT: But what we're really talking about initially here is what amount of hours is reasonable for a certain amount of work and the reasonableness of the hourly fees charged.

MR. BLOOM: Right.

THE COURT: And it seems to me that we plowed that ground initially before the Eleventh Circuit -- they did vacate the fee award, of course, I know that.

MR. BLOOM: Right, right.

THE COURT: Because they had vacated the underlying judgment ordering judgment on its merits.

MR. BLOOM: Right. Correct.

THE COURT: But here we are again needing to look at the reasonableness of fees that were charged, and I don't really see why it's necessary to again determine the reasonableness of the fees charged by the defendants for work that was done before the Eleventh Circuit's reversal.

MR. BLOOM: Right. No, I understand the Court's

question. If I might just make the following point, which is that we're not asking the Court to revisit either the reasonableness of the fees or the hours expended. Our argument as to why we think an adjustment of that prior award is appropriate is based on a point the Court made -- the Eleventh Circuit made in *Norman*, which is that it's appropriate to adjust the results of that lodestar calculation depending on the degree of success of the party. And the Court said if the result was partial or limited success, the lodestar may be reduced to an amount that's not excessive. And it specifically referred to adjustments for what it called unsuccessful theories.

Now, we think that at least to some extent, the Eleventh Circuit did not accept defendants' advocacy and ruled in a way that was in some respects favorable to the plaintiffs, although obviously there was no final determination made by the Eleventh Circuit as to who ultimately would prevail.

So we think based on that movement in the law and the standard articulated in *Norman* that it's appropriate for the Court to say, well, actually, defendants did not succeed to the extent I believe they did.

THE COURT: But when you talk about the lodestar, you are talking about the reasonable --

MR. BLOOM: Correct.

THE COURT: -- hourly rate times the number of hours worked.

MR. BLOOM: That's correct. And what *Norman* --

THE COURT: And it seems to me that there is no need to go back to that old timeframe and revisit what's the reasonable amount of hours and the reasonable fees. What you're talking about is adjusting the lodestar, and that can be done, yes, maybe so, but again, why should we go back and go pore over time entries?

MR. BLOOM: And I'm not suggesting that, Your Honor, just to be clear. I agree with the Court --

THE COURT: Okay.

MR. BLOOM: -- in that regard.

THE COURT: Okay.

MR. BLOOM: I'm simply saying that based on the Eleventh Circuit's appraisal of the merits, it's appropriate to then take that lodestar and say well, this situation has changed somewhat, defendants were not as successful as they were based on the Court's ruling.

THE COURT: I understand what you're saying.

MR. BLOOM: Yeah, that's all.

THE COURT: Now let's talk about what we're going to do going forward.

The defendants would like the plaintiffs to produce billing records. And I -- in my mind, there's no need to do

that for the time covered by the old bill, what we've already been through. So what date would that mean -- do y'all recall what the cutoff date was on the last go-around?

MR. SCHAETZEL: Off the top of my head, I do not, Your Honor. Bear with me, I might be able to produce it.

THE COURT: Now, what the plaintiffs are saying is that they should not have to produce their billing records unless and until the Court determines that those billing records would be helpful to the Court. That's my understanding of your position, right?

MR. BLOOM: Yeah. Yes, basically, Your Honor, but we believe that it may be appropriate in the Court's discretion to look at our billing records, but only if it makes a determination that the defendants have made their threshold showing of adequately justifying the hours that they're seeking to recover from the plaintiffs.

And as we made clear in our papers, we think those are excessive on their face and that the requisite showing, for example, of why it was necessary for multiple senior and junior lawyers to perform certain tasks was justified.

So we think that they have not sort of crossed the threshold of making the showing that the Eleventh Circuit's held as necessary for them to even, you know, be entitled to look at our billing records because our billing records cannot make that showing for them, so we think they've fallen short

of sort of that threshold.

THE COURT: It seems to me that this case is -- uniquely concerns the fair use defense. Of course the defendants have the burden of proof on that. But I believe both sides have been totally dedicated to addressing the fair use defense. And so it would seem to me that what the -- the amount of work the plaintiffs have done that is devoted to that topic would probably be helpful to the Court in determining whether the overall amount of work the defendants have done on that topic is reasonable. What I'm saying is I think -- I really think that it is likely that the plaintiffs are going to have to produce those records in some form. It may just be a question of when.

I think what we need to do first is set a date for the hearing. And, Vicki, could you pick a date that's about a month from now? Well, maybe a month and a half.

MR. BLOOM: Your Honor, may I just make a point, a slightly different point?

THE COURT: Yes, sir.

MR. BLOOM: Thank you. I just wanted to sort of put this entire set of issues in context, if I might. Believe it or not, after all these years, I think the Court's aware of this, the winner of this case has yet to be determined and both the remand decision as well as specifically the decision to award attorneys' fees are now up at the Eleventh Circuit.

And for that reason, defendants strongly believe that the most appropriate course of action for the Court at this point, given the strong interest in judicial economy, is to deny defendants' motions without prejudice until the appeal is resolved, until we see whether the fee award survives the appeal, without prejudice to their --

THE COURT: Well, you know, I have thought about that. Why not just wait and see. But here's the problem, as you -- as we've talked about earlier in the hearing, we're all getting older and time is going by and that's the kind of issue that it's probably easier to address it now than later. That's my thought.

MR. BLOOM: Well, yeah, Your Honor, as --

THE COURT: Especially since it doesn't seem to me that the parties are interested in reaching some kind of agreement on this issue.

MR. BLOOM: Well, Your Honor --

THE COURT: In fact, it doesn't look to me like y'all have tried hard at all, either side.

MR. BLOOM: Well, Your Honor, I think -- I appreciate the fact that the Court is prepared apparently to dig into this task, which, you know, will involve sort of a painstaking review of the defendants' time records. And we, as I said, believe that the Court need not undertake that task. Defendants will in no way be prejudiced by a deferral of that

ruling. And if the Court were to issue a fee award while the appeal is pending, that would then require plaintiffs not only to have to post a bond, but to, in all likelihood, initiate a second appeal, all of which may prove to be unnecessary.

And just so the Court's aware, very briefly, I mean, we're arguing at the Eleventh Circuit, and our opening brief was filed last month, not only that reversal on the merits would remove the basis for a fee award, but that -- even if the Eleventh Circuit were to affirm Your Honor's fair use determinations, we believe that under Eleventh Circuit law, given the Court's finding of several infringements and the award of an injunction to plaintiffs, that plaintiffs are the prevailing party as a matter of law. But even if that's not the case --

THE COURT: I'm rolling my eyes.

MR. BLOOM: But even -- but, Your Honor, even if -- even if defendants were properly considered the prevailing party, we believe it's quite clear under *Kirtsaeng* that awarding attorneys' fees to defendants was an abuse of discretion. So we're making at least three levels of argumentation.

THE COURT: I understand your arguments, and I'm -- you know, I'm ready to do what I -- do my part to -- what little I can do at this point to try to move this matter forward.

So, let's see, we need a date, Vicki.

COURTROOM DEPUTY: How long are we going to need? About how long do we need for the hearing?

THE COURT: I'd say several hours.

COURTROOM DEPUTY: How about Friday February 3rd at 11:00?

THE COURT: Anybody got a problem with that?

MR. BLOOM: I'm sorry, I didn't hear you.

COURTROOM DEPUTY: Friday, February 3rd at 11:00.

MR. SCHAETZEL: That date will work for our side, the defendants, thank you.

THE COURT: Okay. All right. Then --

MR. BLOOM: I believe so.

THE COURT: I want for defendants to provide defendants' billing records to the plaintiffs a week before that hearing. And I want for y'all to make sure that they are covered by the confidentiality order. I think we have one.

MR. KRUGMAN: I think you may have said it backwards.

MR. BLOOM: Yes, Your Honor, did you mean to say plaintiffs provide defendants with their billing records?

THE COURT: No.

MR. BLOOM: No, okay. Pardon me.

THE COURT: No. You all, as I understand it, the defendants have not yet provided any records to the plaintiff; is that correct?

MR. SCHAETZEL: I believe that's incorrect.

THE COURT: Okay.

MR. SCHAETZEL: I believe we have provided with our fee request and prior to that all of our billing records. Is that correct, we've provided --

MR. ASKEW: Yeah.

THE COURT: Okay. You may be right. I don't recall seeing any billing records myself. But you wouldn't necessarily file them with the Court, I guess.

MR. SCHAETZEL: Exactly.

MR. BLOOM: Your Honor, just to clear this up, we did receive billing records from the defendants with their fee request. And our review of those records was what prompted us to challenge the fee request.

THE COURT: Okay. All right. So okay. So what I want is this: I want for the plaintiffs to bring with them to the hearing your billing records. And I may very well require that they be turned over at that time. And if I do that, then we'll have to, you know, maybe take -- have another hearing a week after that. And I, you know, honestly, I'd have to tell you that I sort of think that we're going to wind up -- you're going to wind up providing them to the other side. As I said, I -- it's hard for me to believe that it's not going to be relevant, but we'll see.

Okay. Anything else? Any questions?

MR. SCHAETZEL: None from our side, Your Honor.

MR. BLOOM: No. Thank you for your time, Your Honor.

THE COURT: All right. Thank you. Nice to see you.

MR. SCHAETZEL: Thank you.

MR. KRUGMAN: Thank you, Your Honor.

COURTROOM DEPUTY: All rise. The Court will stand in recess.

(Whereupon, the proceedings were adjourned at 2:29 p.m.)

REPORTERS CERTIFICATE

I, Jana B. Colter, Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on December 12, 2016, in the matter of CAMBRIDGE UNIVERSITY PRESS, ET AL V. CARL V. PATTON, ET AL, Case No. 1:08-CV-01425; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (14 pages) is a true and accurate record of the proceedings.

This the 19th day of December, 2016.

/s/ Jana B. Colter, RMR, CRR, CRC
Official Court Reporter